# CUSTOMS BULLETIN AND DECISIONS

**Weekly Compilation of**

**Decisions, Rulings, Regulations, Notices, and Abstracts**

**Concerning Customs and Related Matters of the**

**U.S. Customs Service**

**U.S. Court of Appeals for the Federal Circuit**

**and**

**U.S. Court of International Trade**

**VOL. 32 AUGUST 12, 1998 NO. 32**

*This issue contains:*

U.S. Customs Service

T.D. 98–63 Through 98–65

General Notices

**DEPARTMENT OF THE TREASURY**
**U.S. CUSTOMS SERVICE**

## NOTICE

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# U.S. Customs Service

## *Treasury Decisions*

(T.D. 98–63)

### REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.52 and 111.74 of the Customs Regulations, as amended (19 CFR 111.52 and 111.74), is canceling the following Customs broker licenses without prejudice.

| *Port* | *Individual* | *License #* |
|---|---|---|
| New York | Michael Maraventano | 03186 |
| New York | Fast Cargo, Inc. | 10026 |
| New York | Alex Zadroga | 06263 |
| New York | Judith M. Barzilay | 16619 |
| Los Angeles | Ronald G. Sleeis | 05092 |
| Laredo | Sandra L. Herrera | 11622 |
| Washington, D.C. | Christopher M. Schmitt | 11577 |

Dated: July 24, 1998.

PHILIP METZGER,
*Director,*
*Trade Compliance.*

[Published in the Federal Register, July 30, 1998 (63 FR 40786)]

19 CFR Part 24

(T.D. 98–64)

RIN 1515–AC31

# EXPORTERS NOT LIABLE FOR HARBOR MAINTENANCE FEE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to remove the requirement that an exporter of cargo is liable for the payment of the Harbor Maintenance Fee when cargo is loaded for export at a port subject to the Harbor Maintenance Fee. This change is required pursuant to a Supreme Court decision finding that the Harbor Maintenance Fee for exporters was in violation of the Export Clause of the Constitution of the United States.

EFFECTIVE DATE: The amendment to 19 CFR § 24.24 is effective July 31. Collection of the Harbor Maintenance Fee on exports was discontinued effective April 25, 1998.

FOR FURTHER INFORMATION CONTACT: Patricia Barbare, Operations Management Specialist, Budget Division, U.S. Customs Service, (202) 927–0310.

SUPPLEMENTARY INFORMATION:

## BACKGROUND

The Harbor Maintenance Fee was created by the Water Resources Development Act of 1986 (Pub. L. 99–662)(26 U.S.C. 4461 *et seq.)* (the Act), and is implemented by § 24.24 of the Customs Regulations (19 CFR 24.24). The fee, pursuant to the Act and as implemented by the regulations, became effective on April 1, 1987, and has been assessed on port use associated with imports, exports, and movements of cargo and passengers between domestic ports. The fee is paid to the U.S. Customs Service. The fee has been imposed at the time of loading for exports and unloading for other shipments. Exporters, importers and domestic shippers have been obligated, pursuant to the statute and regulations, to pay 0.125 percent of the value of the commercial cargo shipped through identified ports. The fee, once collected by Customs, is deposited in the Harbor Maintenance Trust Fund, from which Congress may appropriate amounts to pay for harbor maintenance and development projects and related expenses.

On March 31, 1998, the Supreme Court in *United States v. United States Shoe Corp.*, 118 S. Ct. 1290, No. 97–372 (March 31, 1998), declared that the Harbor Maintenance Fee is unconstitutional as applied to exports. The Court found that the Harbor Maintenance Fee was a tax

imposed on an *ad valorem* basis and as such, the fee was not a fair approximation of the services, facilities or benefits furnished to the exporter. Therefore, the Court ruled the Harbor Maintenance Fee does not qualify as a permissible user fee for exporters and is in violation of the Export Clause of the Constitution. By a notice published in the Federal Register (63 FR 24209) on May 1, 1998, Customs announced that as of April 25, 1998, it will no longer be collecting the Harbor Maintenance Fee for cargo loaded on board a vessel for export.

This document amends § 24.24 of the Customs Regulations (19 CFR 24.24) to make the regulation consistent with the Supreme Court decision; the document amends the regulation by removing the requirement that an exporter of cargo is liable for the payment of the Harbor Maintenance Fee when cargo is loaded for export at a port subject to the Harbor Maintenance Fee.

## Inapplicability of Notice and Delayed Effective Date

Because the amendment to the Customs Regulations contained in this document removing exporters from having to pay the Harbor Maintenance Fee is being made in response to a Supreme Court decision, pursuant to section 553(a)(1) of the Administrative Procedure Act, (5 U.S.C. 553(a)(1)), no notice of proposed rulemaking or public procedure is necessary. For the same reason, a delayed effective date is not required pursuant to 5 U.S.C. 553(d)(3).

## Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply. Accordingly, this final rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

## Executive Order 12866

This amendment does not meet the criteria of a "significant regulatory action" as described in E.O. 12866.

## Drafting Information

The principal author of this document was Keith B. Rudich, Esq., Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

## List of Subjects in 19 CFR Part 24

Accounting, Canada, Claims, Customs duties and inspections, Fees, Financial and accounting procedures, Foreign trade statistics, Harbors, Imports, Reporting and recordkeeping requirements, Taxes, Trade Agreements, U.S.-Canada Free-Trade Agreement, User fees, Wages.

## Amendment to the Regulations

Accordingly, § 24.24 of the Customs Regulations (19 CFR § 24.24) is amended as set forth below:

## PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURES

1. The general authority for Part 24, Customs Regulations (19 CFR Part 24) and the specific relevant authority citation for § 24.24 Customs Regulations (19 CFR 24.24), continue to read as follows:

**Authority:** 5 U.S.C. 301, 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1450, 1624; 31 U.S.C. 9701.

* * * * * * *

Section 24.24 also issued under 19 U.S.C. 4461, 4462;

* * * * * * *

2. Section 24.24 is amended by removing paragraph (d)(3)(ii) and redesignating paragraph (d)(3)(iii) as (d)(3)(ii); by removing paragraph (e)(2) and redesignating paragraphs (e)(3), (4) and (5) as paragraphs (e)(2), (3), and (4) respectively; by removing the word "exporter," in paragraph (g); by removing the word "exporter," in paragraph (h)(1); and by removing the words ", exporting" and "the SED," in paragraph (i).

WILLIAM F. RILEY,
*Acting Commissioner of Customs.*

Approved: July 8, 1998.
JOHN P. SIMPSON,
*Deputy Assistant Secretary of the Treasury.*

[Published in the Federal Register, July 31, 1998 (63 FR 40822)]

19 CFR Part 101

([T.D. 98–65)

## GEOGRAPHICAL DESCRIPTION OF KODIAK, ALASKA CUSTOMS PORT OF ENTRY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Customs published in the Federal Register of March 17, 1998, a final rule establishing a Customs port of entry at Kodiak, Alaska. This document corrects the geographical description of the port limits of Kodiak to include the Womens Bay port facilities and Kodiak State Airport as well as the city limits of Kodiak.

EFFECTIVE DATE: July 31, 1998.

FOR FURTHER INFORMATION CONTACT: Harry Denning, Office of Field Operations, 202–927–0196.

SUPPLEMENTARY INFORMATION:

### BACKGROUND

Section 123 of the Treasury and General Appropriations Act, 1998 (Pub. L. 105–61 of October 10, 1997) provides that the Secretary of the Treasury shall establish the port of Kodiak, Alaska, as a port of entry. In a document published as T.D. 98–24 in the Federal Register (63 FR 12994) on March 17, 1998, Customs amended its regulations to designate Kodiak as a port of entry. That document described the port limits of Kodiak as the Kodiak city limits. Since that publication, it has come to Customs attention that the port limits of Kodiak encompass more than the city limits. The port limits encompass both the Womens Bay port facilities and the Kodiak State Airport. This document sets forth the accurate port limits of Kodiak, Alaska.

### PORT LIMITS

The port limits of Kodiak, Alaska are the Kodiak city limits; the adjacent Womens Bay port facilities located approximately 7 miles from downtown Kodiak on Rezanof Drive West which is a state highway; and the Kodiak State Airport located approximately 4.5 miles from downtown Kodiak and 3 miles from the south boundary of the City of Kodiak corporate boundary on the Rezanof Drive West which is a state highway. The Womens Bay port facilities parcel is 5 miles from the south boundary of the corporate city limits of the City of Kodiak. The site includes tidelands and the adjacent uplands of Womens Bay and is generally located in Section 21, Township 28 South, Range 20 West, Seward Meridian according to the USGS 1:63360 scale quadrangle maps of Kodiak (C–2 and D–2) Alaska. The Kodiak State Airport site includes the

developed and undeveloped lands and is generally located within Section 15, Township 28 South, Range 20 West, Seward Meridian according to the USGS 1:63360 scale quadrangle map of Kodiak (D–2) Alaska.

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT AND DELAYED EFFECTIVE DATE

Because this document relates to agency organization and management and merely corrects the geographical description of a port, the establishment of which was directed by Congress, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

REGULATORY FLEXIBILITY ACT

Because this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

EXECUTIVE ORDER 12866

Agency organization matters such as this are exempt from consideration under Executive Order 12866.

LIST OF SUBJECTS IN PART 101

Customs duties and inspection, Customs ports of entry, Exports, Foreign trade, Harbors, Imports, Reporting and recordkeeping requirements, Shipments, Vessels.

AMENDMENTS TO THE REGULATIONS

For the reasons set forth in the preamble, § 101.3 of the Customs Regulations is amended as set forth below:

PART 101—GENERAL PROVISIONS

1. The general authority citation for Part 101 and the specific authority citation for §§ 101.3 and 101.4 continue to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624.

* * * * * * *

Sections 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b;

* * * * * * *

2. Section 101.3(b)(1) is amended by removing the reference "T.D. 98–24" in the "Limits of port" column adjacent to the entry for "Kodiak" in the "Ports of entry" column under Alaska and adding in its place the reference "T.D. 98–65."

SAMUEL H. BANKS,
*Acting Commissioner of Customs.*

Dated: June 10, 1998.

JOHN P. SIMPSON,
*Deputy Assistant Secretary of the Treasury.*

[Published in the Federal Register, July 31, 1998 (63 FR 40823)]

# U.S. Customs Service

## *General Notices*

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
*Washington, DC, July 29, 1998.*

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
*Assistant Commissioner,*
*Office of Regulations and Rulings.*

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### PROPOSED MODIFICATION OF RULING LETTER RELATING TO TEMPORARY IMPORTATION UNDER BOND OF SULPHUR MANUFACTURED INTO PHOSPHATE PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the temporary importation under bond of sulphur manufactured into phosphate products. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before September 11, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Caridad Berdut, Duty & Refund Determination Branch (202) 927–0657.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the temporary importation under bond of sulphur manufactured into phosphate products. Comments are invited on the correctness of the proposed ruling.

In Headquarters Ruling (HRL) 225566 dated August 7, 1994, Customs held that the sulfuric acid and phosphogypsum (PPG) which result from the manufacture of sulphur into phosphate products were considered by-products which must be exported or destroyed. HRL 225566 is set forth as Attachment A to this document.

Elemental sulphur is used in the manufacture of phosphoric acid, which in turn is used to produce phosphate fertilizer products. A "wet process" is used in the production of phosphoric acid. The sulphur is converted into sulphuric acid by oxidizing the sulphur and combining the resulting gas with water. The phosphate rock is mixed with a dilute solution of phosphoric acid to create slurry. The slurry is fed into tanks where it is reacted with sulphuric acid, resulting in phosphoric acid and phosphogypsum ("PPG") or calcium sulfate dihydrate, which recombines with water to form PPG. HRL 225566 concluded that PPG was a worldwide recognized product of commerce. PPG is used as a soil stabilizer and it is sold for use in Portland cement as a retarder. The ruling went on to conclude that because the PPG was a commodity recognized in commerce it was a by-product which must be exported or destroyed in order to comply with the terms of the temporary importation bond.

Upon further examination, we are of the opinion that the PPG is a valuable waste rather than a by-product. It has come to our attention that the sale of PPG is regulated in the United States because of the radon content. Environmental Protection Agency ("EPA") regulations provide three limited categories of use for PPG: (1) it may be used for agricultural purposes if the certified concentration of radium-226 in the PPG is not more than 10 pCi/g (40 CFR 61.204); (2) PPG may be used for research and development, subject to various restrictions (40 CFR 61.205); and (3) PPG may be used for such other purposes as may be approved by the EPA after considering, *inter alia*, the quantity involved, the measures that will be taken to prevent the uncontrolled release of PPG into the environment, and the risk associated with the proposed use. In C.S.D. 83–5 we adopted the consideration of several elements used to determine whether merchandise is considered a by-product as opposed to waste. After applying the criteria set forth in C.S.D. 83–5 to the new information we have received, and reviewing the

opinion rendered by the Office of Laboratory and Scientific Services, we conclude that PPG is a waste.

Therefore, Customs intends to modify HRL 225566 to reflect that the PPG which results from the manufacture of phosphoric acid is a valuable waste. Duties may be tendered in lieu of exportation or destruction of the PPG. Proposed HRL 227247 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 C.F.R. 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 22, 1998.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

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[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
*Washington, DC, August 7, 1995.*

CON–9–04–R:C:E 225566 CC
Category: Temporary Importation under Bond

ROBERT T. NOVICK, ESQ.
STEPTOE & JOHNSTON
*1330 Connecticut Avenue, N.W.*
*Washington, D.C. 20036–1795*

Re: Temporary Importation under Bond for sulphur manufactured into phosphate products; subheading 9813.00.05, HTSUS; Wastes or By-Products, Note 2(b) to Subchapter XIII; FIFO accounting for commingled fungible merchandise.

DEAR MR. NOVICK:

This is in response to your inquiry, on behalf of Occidental Chemical Corporation (OxyChem), requesting a ruling concerning the applicability of the Temporary Importation under Bond (TIB) provision of subheading 9813.00.05 of the Harmonized Tariff Schedule of the United States (HTSUS).

*Facts:*

You state that OxyChem intends to import elemental sulphur, presently classifiable under subheading 2503.10.00, HTSUS, from one or more Canadian suppliers in order to manufacture phosphate products. OxyChem does not intend to sell these finished products or any the imported sulphur in the United States.

Phosphate products are produced through the combination of phosphate rock and sulfuric acid. Under the process to be used by OxyChem, known as the "wet process," phosphate rock is charged into a reactor system, where it is mixed with a dilute solution of phosphoric acid, and fed into tanks. In these tanks, the slurry is reacted with sulfuric acid, produced by burning the imported sulphur, until the mixture reaches approximately 54 percent phosphoric acid. During this period, the slurry is vigorously agitated and maintained at a strict temperature of (XX) degrees to (XX) degrees Celsius for (X) to (X) hours. The slurry passes to a horizontal, rotating vacuum filter, where the phosphoric acid is separated from solid impurities, primarily phosphogypsum (PPG).

From this phosphoric acid, OxyChem produces three end products for export. The first, merchant grade phosphoric acid (MGA), is produced by clarifying and concentrating the phosphoric acid to approximately 54 percent $P_2O_5$. The second, superphosphoric acid (SPA), is produced by further refining and concentrating the phosphoric acid to approximately 70 percent $P_2O_5$. The third, DAP, is produced by reacting phosphoric acid with anhydrous ammonia. OxyChem currently has facilities to perform all of these operations in the United States.

From an input cost for sulphur, phosphate rock, and anhydrous ammonia of $(XXX) million, excluding the cost of inert materials, OxyChem can produce and sell $(XXX) million worth of MGA, SPA, and DAP, based on current prices for these products. As a result of this process, 4.2 million tons of PPG will be produced. Because the supply of PPG far exceeds demand, the vast majority of it is placed in stockpiles. Approximately 100,000 tons of PPG is intended to be sold domestically at a cost of $(X)–$(XX) per ton. Of the 2.5 million tons of sulfuric acid produced from the inputs described above, OxyChem could expect to sell approximately (XXX,000) tons of excess sulfuric acid at a market price of $(XX) per ton. Most of the sulfuric acid, approximately 2.34 million tons, is required for the production of phosphoric acid. No free sulphur will remain at the end of this process, having been consumed in the manufacture of the above-described products.

You state that you believe that the TIB and domestic molten sulphur used for the production of the phosphate products is fungible. You have listed, as the most important molten sulphur specifications, the following:

| | | |
|---|---|---|
| Sulphur Purity: | (XX.X)% | (min.) |
| Ash Content: | (.XX)% | (max.) |
| Carbon Content: | (.XX)% | (max.) |
| Free Acid Content | (.XXX)% | (max.) |

You have also included, in an attachment, specifications listing the content in the molten sulphur of other trace elements, such as arsenic, selenium, and tellurium, that are supplied to OxyChem by each sulphur producer.

You have also supplied information concerning the inventory records OxyChem maintains to track commingling of domestic and TIB sulphur in storage. You state that OxyChem can provide evidence of the point TIB and non-TIB merchandise is actually physically commingled, and maintains an adequate inventory control system consistent with C.S.D. 88–1 and Schedule X of Part 181, 19 CFR.

Specifically, you state that OxyChem calculates its inventories, including both a TIB and non-TIB products in raw and finished forms. OxyChem can determine when and how much TIB sulphur was added to inventory by shipment and rail movement information. In addition, OxyChem can calculate the date and amount of product exported.

*Issue:*

Whether the above-described operation qualifies as a process for purposes of temporary duty-free treatment under subheading 9813.00.05, HTSUS?

Whether the phosphogypsum (PPG) and sulfuric acid are considered by-products, requiring that they be exported or destroyed in accordance with Note 2(b) to Subchapter XIII?

Whether the TIBs may be canceled on a first-in-first-out (FIFO) basis upon exportation of the finished products when a portion of the finished product is manufactured from fungible domestic merchandise commingled with fungible TIB merchandise?

*Law and Analysis:*

Subheading 9813.00.05, HTSUS, provides for temporary duty-free entry, under bond, for merchandise imported into the United States for the purpose of repair, alteration or processing, including processes which result in articles manufactured or produced in the United States. This provision requires that the imported merchandise be exported or destroyed within one year of the date of importation. See Subchapter XIII, U.S. Note 1(a). It is clear the operations described above qualify as a process under the subheading.

Note 2(b) of Subchapter XIII states that if any processing of such merchandise results in an article manufactured or produced in the United States, such merchandise may be admitted into the United States under subheading 9813.00.05 only on the condition that (i) a complete accounting will be made to the Customs Service for all articles, wastes and irrecoverable losses resulting from such processing; and (ii) all articles and valuable wastes resulting from such processing will be exported or destroyed under customs supervision within the bonded period; except that in lieu of the exportation or destruction of valuable

wastes, duties may be tendered on such wastes at rates of duties in effect for such wastes at the time of importation.

The merchandise imported by OxyChem is also processed into phosphogypsum (PPG) and sulfuric acid. If considered valuable wastes and the requirements of Note 2(b) to Subchapter XIII are met, duties could be paid on the PPG and sulfuric acid, in lieu of exporting or destroying them. We have found, however, that the terms "by-products" and "wastes" are not synonymous for TIB purposes. *See* C.S.D. 82–109; HQ 214044, dated April 6, 1982, and C.S.D. 83–5, HQ 214273, dated August 13, 1982. Consequently, if the PPG and sulfuric acid are considered by-products, they must be exported or destroyed in accordance with Note 2(b) of Subchapter XIII to avoid breach of the TIB.

In C.S.D. 83–5 we adopted the consideration of several elements used to determine whether merchandise is considered a by-product as opposed to a waste for drawback purposes. These elements, which have been employed for TIB purposes, are the following: 1. The nature of the material of which the residue is composed. 2. The value of the residue as compared to the value of the principal product and the raw material. 3. The use to which it is put. 4. Its status under the tariff law, if imported. 5. Whether it is a commodity recognized in commerce. 6. Whether it must be subjected to some process to make it saleable.

Based on the these elements and a report by our Office of Laboratories and Scientific Services, we believe that PPG should be considered a by-product. PPG, whether or not purified or whether or not calcine, is a worldwide recognized product of commerce. PPG is used as a soil stabilizer and in North America as a fertilizer for soils deficient in sulphur. It is sold for use in Portland cement as a retarder. Occasionally, PPG is used to produce sulfuric acid, and phosphoric acid manufacturers having no nearby source of supply for sulfuric acid have used this process. In addition, PPG has been used in Europe and Japan as a building plaster. The PPG process produces sufficient volume of by-product to have potential commercial value. Despite the high level of impurities PPG contains, they are easily removed, although at a high cost when compared with the cost of production of natural calcium sulfate. Although the price differential of the PPG and the phosphate products ranges from $142 to $282, we do not believe that this factor, by itself, shows that PPG should be considered a waste, especially since all of the other pertinent factors indicate that PPG is a by-product.

Sulfuric acid is an intermediate that can be isolated and sold as a bona fide article of commerce. According to our Office of Laboratories and Scientific Services, the sulfuric acid which is not used in the manufacture of the phosphoric acid products should be considered a by-product of this process.

Consequently, based on the foregoing factors, we believe that both PPG and sulfuric acid are by-products in the manufacture of phosphate products by OxyChem.

You state that the sulphur, imported from Canada, will be commingled with domestic sulphur. You state that the sulphur is a fungible good, and as a practical matter, it is impossible for OxyChem to segregate the domestic and imported components. Consequently, you request that Customs cancel the TIBs on a FIFO basis, provided that OxyChem has on hand at all times a sufficient quantity of the merchandise to cancel all outstanding TIBs.

Concerning the issue of fungibility, you have submitted specifications regarding the purity of the molten sulphur and the impurities it contains. We, along with our Office of Laboratories and Scientific Services, have examined these specifications and find that the molten sulphur is fungible, provided that it is crude or unrefined. The Office of Laboratories and Scientific Services did note that refined, sublimated or precipitated products would not be fungible with the crude or unrefined sulphur.

You have also requested that if we find the sulphur is fungible, the TIBs be canceled on a FIFO basis. The Customs Service has interpreted the temporary importation under bond provisions as usually requiring direct identification of each particular article to show timely exportation. There have been exceptions, however, to the policy of requiring direct identification of each individual article covered by a TIB entry when direct identification of the imported merchandise was inconceivable because the physical identity of the imported merchandise and the ability to directly account for the imported merchandise was lost due to commingling. The FIFO method has been employed as one such exception. *See* C.S.D. 86–16, HQ 218370, dated December 9, 1985, in which TIBs were permitted to be canceled on a FIFO basis when fungible merchandise entered for consumption and merchandise entered under a TIB, under item 864.05, TSUS (presently subheading 9813.00.05, HTSUS), were commingled and sufficient merchandise was maintained in the commingled merchandise to cancel all outstanding TIBs.

According to your submissions, OxyChem's inventory control system is adequate to account for TIB and non-TIB merchandise, and you state it contains records consistent with those listed in C.S.D. 88–1 and Schedule X, Appendix to 19 C.F.R. Part 181. Also, you state that OxyChem's records include those showing total fungible merchandise commingled, total TIB input commingled, the date of such commingling, the record of each input into the commingled material and the record of each withdrawal, the date on which each withdrawal is made, and the quantity withdrawn.

Based on the foregoing, Customs will cancel the TIBs on a FIFO basis, when OxyChem's records show by a strict FIFO record keeping system that the phosphate products, including the by-products attributed to a specific TIB receipt of sulphur, were exported timely. In addition, OxyChem must have on hand at all times a sufficient quantity of the merchandise to cancel all outstanding TIBs, and all other applicable requirements must be met.

We note that elemental sulphur from Canada is currently the subject of an antidumping duty order. While articles qualifying for treatment under subheading 9813.00.05, HTSUS, are not presently subject to the payment of antidumping duties, the bond submitted under the temporary importation procedures must be set in such an amount as to take into account the antidumping duties that would otherwise be collected if the conditions of the provision are not met. *See* 19 C.F.R. §10.31(f) and HQ 223491 of March 30, 1992.

*Holding:*

The manufacture of sulphur into phosphate products qualifies as a process under subheading 9813.00.05, HTSUS for temporary importation in the United States, under bond.

The sulfuric acid and phosphogypsum (PPG) which result from the manufacturing process are considered by-products, which must be exported or destroyed.

The FIFO method, as illustrated in Schedule X to the 19 C.F.R. Part 181 Appendix, may be used for canceling the TIBs when the finished products are manufactured from fungible domestic merchandise commingled with fungible TIB merchandise, and sufficient merchandise is maintained in the commingled merchandise to cancel all outstanding TIBs.

The bond submitted under the temporary importation procedures must be set in such an amount as to take into account the antidumping duties that would otherwise be collected if the conditions of the provision are not met.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

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[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
*Washington, DC.*

CON–9–04 RR:CR:DR 227247 CB
Category: Temporary Importation Under Bond

STEPHEN L. GIBSON, ESQ.
ARENT FOX KINTNER PLOTKIN & KAHN
*1050 Connecticut Avenue, N.W.*
*Washington, D.C. 20036–5339*

Re: Temporary Importation under Bond for sulphur manufactured into phosphate products; subheading 9813.00.05, HTSUS; Wastes or By-Products, Note 2(b) to Subchapter XIII; Reconsideration of HQ 225566.

DEAR MR. GIBSON:

This is in response to your letter on behalf of PCS Phosphate Company and White Springs Agricultural Chemicals, Inc., requesting a reconsideration of HQ 225566 concerning the applicability of the Temporary Importation Under Bond (TIB) provision of subheading 9813.00.05 of the Harmonized Tariff Schedule of the United States (HTSUS).

In a follow-up letter dated December 23, 1997, you submitted additional documentary evidence and requested confidential treatment of Exhibit 2 in accordance with 19 CFR

§177.2(b)(7). Please be advised that we have reviewed the submission and concluded that the submission contains proprietary business information. Your request for confidential treatment of Exhibit 2 is hereby GRANTED.

*Facts:*

PCS Phosphate Company, Inc., and its sister company White Springs Agricultural Chemicals, Inc., (collectively "PCS"), mine phosphate ore at two U.S. locations (White Springs, FL and Aurora, NC) and use the phosphate ore to produce phosphate rock and products therefrom, including phosphoric acid. PCS presently conducts phosphate operations at facilities previously owned by Occidental Chemical Corporation and Texasgulf, Inc.

PCS wishes to import elemental sulphur under TIB for use in the manufacture of phosphoric acid, which in turn is used to produce phosphate fertilizer products including merchant grade phosphoric acid ("MGA"), superphosphoric acid ("SPA"), and diammonium phosphate ("DAP"), as well as purified phosphoric acid and certain feed products (monocal and dical). PCS intends to export the phosphate products that are produced using the sulphur imported under TIB.

PCS uses the "wet process" for production of phosphoric acid. The basic input materials for this process are sulphur and phosphate rock. The sulphur is converted into sulphuric acid by oxidizing (burning) the sulphur and combining the resulting gas with water. The phosphate rock is mixed with a dilute solution of phosphoric acid to create a slurry. The slurry is fed into tanks where it is reacted with sulphuric acid, resulting in phosphoric acid and phosphogypsum ("PPG") or calcium sulfate dihydrate, which recombines with water to form PPG. Following the reaction process, the slurry passes through a rotating vacuum filter, where the phosphoric acid is separated from insoluble impurities resulting from the process, primarily the PPG. The phosphoric acid may be refined into MGA or SPA or purified phosphoric acid, or it may be further processed by mixing with anhydrous ammonia to produce DAP. MGA, SPA and DAP are sold by PCS as fertilizers.

PCS presently conducts phosphate operations at facilities previously owned by Occidental Chemical Corporation ("OxyChem"), having acquired the same on October 31,1995. At OxyChem's request, a binding ruling (HQ 225566, dated August 7, 1995) was issued addressing the importation under TIB of sulphur. Customs held that: (1) the manufacture of sulphur into phosphate products qualified as a process under subheading 9813.00.05, HTSUS; (2) the sulphuric acid and PPG were by-products which must be exported or destroyed; and (3) that the FIFO method, as illustrated in Schedule X to the Appendix to Part 181, Customs Regulations, could be used to cancel TIBs.

You have requested a reconsideration of HQ 225566. You are seeking confirmation that the production of phosphoric acid is a process for TIB purposes and that TIBs may be canceled using FIFO. You have also requested that we reconsider our conclusion that the PPG resulting from such processing is a by-product and, in the event we agree that PPG is a valuable waste, confirm that the applicable rate of duty of the PPG is the rate applicable to gypsum.

*Issues:*

1. Whether the above-described operation qualifies as a process for purposes of temporary importation under bond pursuant to 9813.00.05, HTSUS.

2. Whether the phosphogypsum (PPG) is considered a by-product, requiring that it be exported or destroyed in accordance with Note 2(b) to Subchapter XIII.

3. Whether the TIBs may be canceled on a first-in first-out (FIFO) basis upon exportation of the finished products when a portion of the finished product is manufactured from fungible domestic merchandise commingled with fungible TIB merchandise.

*Law and Analysis:*

*Issue #1:*

Subheading 9813.00.05, HTSUS, provides for temporary duty-free entry, under bond, for merchandise imported into the United States for the purpose of repair, alteration, or processing, including processes which result in articles manufactured or produced in the United States. This provision requires that the imported merchandise be exported or destroyed within one year of the date of importation. See Subchapter XIII, U.S. Note 1(a).

Note 2(b) of Subchapter XIII states that if any processing of such merchandise results in an article manufactured or produced in the United States, such merchandise may be admitted into the United States under subheading 9813.00.05 only on the condition that (1) a

complete accounting will be made to Customs for all articles, wastes and irrecoverable losses resulting from such processing; and (2) all articles and valuable wastes resulting from such processing will be exported or destroyed under Customs supervision within the bonded period; except that in lieu of the exportation or destruction of valuable wastes, duties may be tendered on such wastes at rates of duties in effect for such wastes at the time of importation.

As stated in HQ 225566, the processing of sulphur into phosphate products is an operation that qualifies as a process for purposes of subheading 9813.00.05, HTSUS.

*Issue #2:*

HQ 225566 held that the sulfuric acid and phosphogypsum which result from the manufacturing process are considered by-products which must be exported or destroyed pursuant to Note 2(b) of Subchapter XIII, Chapter 98, HTSUS. This conclusion was based on a report by the Office of Laboratories and Scientific Services and an application of the elements set forth in C.S.D. 83–5. It is your position that HQ 225566 erroneously assumed that PPG is the same as natural gypsum. You state that PPG is not intentionally produced but is an inevitable waste product resulting from the manufacture of phosphoric acid by the wet process. In support of your position you point out that because of radon emissions, PPG is closely regulated and may only be used as approved by the Environmental Protection Agency ("EPA"); furthermore, the volume of production of PPG does not present commercial opportunities but, rather, creates problems of storage and disposition. Whether the PPG is left in stacks or is mixed with clay for use as landfill, dealing with the PPG generated by the production process imposes substantial costs that cannot be recovered by the sale of PPG.

You also indicate that your client has developed a method of mixing PPG with clay for use as landfill in mined-out areas. PPG is currently being used as landfill at your client's plant at Aurora, North Carolina. However, the PPG generated at the White Springs, Florida, plant is placed in stacks. Per your request for reconsideration, approximately 65,000 short tons of PPG generated at the two plants is sold to local farmers under the EPA agricultural rule. You also state that PCS generates approximately 12 million short tons of PPG per year. The sales of PPG represent approximately 0.5% of the PPG generated annually by your client.

In your request for reconsideration, you point out that Environmental Protection Agency (EPA) regulations provide three limited categories of use for PPG: (1) it may be used for agricultural purposes if the certified concentration of radium-226 in the PPG is not more than 10 pCi/g (40 CFR 61.204); (2) PPG may be used for research and development, subject to various restrictions (40 CFR 61.205); and (3) PPG may be used for such other purposes as may be approved by the EPA after considering, *inter alia*, the quantity involved, the measures that will be taken to prevent the uncontrolled release of PPG into the environment, and the risk associated with the proposed use.

At our request, the Office of Laboratories and Scientific Services ("the Lab") reviewed the information you submitted regarding the EPA's treatment of PPG. The EPA defines phosphogypsum as the solid waste byproduct which results from the process of wet acid phosphorous production. *See* 40 CFR 61.201(b). Furthermore, as discussed above, PPG may be distributed in commerce for use in agriculture and other limited applications provided that the radon content requirements established by EPA are met. 40 CFR 61.200 *et seq*. The Lab determined that, based on this additional information, it had undervalued the fact that U.S. marketing of PPG was limited due to EPA regulations. Thus, the Lab agreed that PPG is a waste.

After applying the criteria set forth in C.S.D. 83–5, including the additional information you have provided and the Lab's opinion, we conclude that PPG is a waste. The question then becomes whether PPG is a valuable or valueless waste. In C.S.D. 80–80 Customs addressed the issue of valuable vs. valueless waste. The decision addressed the question of whether scrap resulting from the processing of steel ingots was valuable waste. The decision states that the test to be applied in regard to waste is commercial value. "As consistently interpreted by the Customs Service, this [valuable vs. valueless waste] refers to any value as an article of commerce, not value relative to costs in a particular context." Further, we held that "* * * the fact that the scrap does have commercial value under standards consistently applied by the Customs Service precludes a finding that the scrap does not have value * * *" for TIB purposes. Based on the foregoing established precedent, we conclude that the PPG is a valuable waste. While we agree that because of EPA regulations PPG has limited marketability, the fact remains that PPG may be, and in fact is, distributed in com-

merce for use in agriculture and other applications provided the radon content requirements established by EPA are met.

Accordingly, PCS Phosphate may tender duties on the PPG at the rate of duty in effect at the time of importation. You suggest that this merchandise is classifiable under subheading 2520.10.00, HTSUS, which provides for Gypsum; anhydrite; plasters, etc.: Gypsum, anhydrite. This subheading has a Free duty rate. We disagree with your suggested classification. Subheading 2520.10.00, HTSUS, is an eo nomine provision that covers natural forms of gypsum. Therefore, the PPG is more appropriately classified under subheading 2520.20.00, HTSUS, which provides for Gypsum, anhydrite; plasters (consisting of calcined gypsum or calcium sulfate), etc.: Plasters. The applicable duty rate is 8.3¢ per ton.

*Issue #3:*

In HQ 225566 we held that the FIFO method, as illustrated in Schedule X to the Appendix to 19 CFR Part 181, may be used for canceling TIBs when the finished products are manufactured from fungible domestic merchandise commingled with fungible TIB merchandise, and sufficient merchandise is maintained in the commingled merchandise to cancel all outstanding TIBs.

According to your request for reconsideration (and a subsequent submission dated December 23, 1997), sulphur is entered into inventory based on date of receipt and unloading. During a meeting held on February 25, 1998, you indicated that the sulphur is in liquid form. You also indicated that your client can tell how much phosphate is foreign but cannot tell the order the cars were unloaded because the rail cars are emptied out simultaneously.

Your client proposes to establish two accounting lots, i.e., TIB sulphur and non-TIB sulphur, for the sulphur inventory at each plant. PCS inventory records would show entries into each lot on a daily basis, resulting in a daily layering of inventory in each lot for FIFO purposes. Export shipments of finished product would be charged first against TIB inventory, on a FIFO basis, to the extent TIB inventory existed, and then against non-TIB inventory. Domestic shipments would be charged against non-TIB inventory on a FIFO basis.

As stated in your request for reconsideration, Customs has applied the accounting methods acceptable for nonsubstitution drawback identification to TIBs. The Customs Service has recently published the Final Rule revising the Customs Regulations regarding drawback. *See* 63 Fed. Reg. 10970 (1998) (to be codified at 19 CFR §191). The conditions and criteria for identification by an accounting method are set forth in §191.14(b). More specifically, the regulation provides that:

> The person using the identification method must be able to establish that inventory records * * * prepared and used in the ordinary course of business, account for the lots of merchandise or articles to be identified *as being received into and withdrawn from the same inventory.* * * * If any such inventory records (that is, inventory records prepared and used in the ordinary course of business) *treat receipts and withdrawals as being from different inventories*, those inventory records must be used and receipts into or withdrawals from the different inventories *may not be accounted for together.* (emphasis added)

19 CFR §191.14(b)(2).

PCS proposes to maintain two separate accounting lots, that is TIB and non-TIB lots. Export shipments will always be charged first against the TIB inventory. Such an approach is clearly precluded by the above-referenced regulation. Under the FIFO inventory system both export and domestic shipments must be withdrawn from the same inventory.

You cite C.S.D. 82–35 in support of your proposal. Said Customs Service Decision held that FIFO may be used as the basis for identification for drawback on fungible merchandise belonging to several persons and commingled in storage considering only his own inputs and withdrawals. This decision does not hold that one person can have several inventories of commingled fungible merchandise and decrement each inventory on a FIFO basis, as PCS proposes to do. You also cite Headquarters Ruling 215762, dated August 12, 1983 in support of your proposal. For clarification purposes it should be noted that HQ 215762 is an informational letter and not a binding ruling. Nonetheless, the letter includes an example of how the FIFO method actually operates. As the example shows, both drawback and nondrawback withdrawals are decremented from a single inventory. The example does not show that drawback withdrawals are made from a drawback eligible lot and nondrawback withdrawals are made from another lot.

Based on the foregoing discussion we conclude that the FIFO method proposed by PCS does not meet the criteria for identification by an accounting method. As such, PCS may

not use the proposed method to cancel TIBs when there is a commingling of fungible TIB and domestic merchandise.

*Holding:*

HQ 225566 is revoked in part and affirmed in part.

The manufacture of sulphur into phosphate products qualifies as a process under subheading 9813.00.05, HTSUS, for TIB purposes. The phosphogypsum (PPG) which results from the manufacturing process is valuable waste. In lieu of exportation or destruction, duty may be tendered on the PPG waste. The valuable PPG waste is classifiable under subheading 2520.20.00, HTSUS, dutiable at 8.3¢ per ton. The proposed accounting method may not be used for canceling TIBs because the domestic and TIB merchandise is not accounted for in a single inventory.

JOHN DURANT,
*Director,*
*Commercial Rulings Division.*

## PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CORN SYRUP

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify New York Ruling Letter (NYRL) 817784, dated January 18, 1996, concerning the classification of Supreme Golden Corn Syrup.

DATE: Comments must be received on or before September 11, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Commercial Rulings Division, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Comments submitted may be inspected at the same office.

FOR FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch, Office of Regulations and Rulings (202) 927–1109.

SUPPLEMENTARY INFORMATION:

### BACKGROUND

Pursuant to 19 U.S.C. 1625(c)(1), this notice advises interested parties that Customs intends to modify NYRL 817784, which held that one of the articles, Supreme Golden Corn Syrup, was classified in subhead-

ing 1702.30.4040, Harmonized Tariff Schedule of the United States (HTSUS)), which provides for glucose and glucose syrup, not containing fructose or containing in the dry state less than 20 percent by weight of fructose * * * other * * * glucose syrup.

Customs intends to modify NYRL 817784, to reflect the proper classification of the syrup in subheading 2106.90.9997, HTSUS, which provides for food preparations not elsewhere specified or included * * * other * * * other: containing sugar derived from sugar cane and/or sugar beet. NYRL 817784 is set forth in Attachment A to this document.

Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter 960235 modifying NYRL 817784, and classifying the syrup in subheading 2106.90.9997, HTSUS, is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 28, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division,
Office of Regulations and Rulings.)

[Attachments]

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[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
*New York, NY, January 18, 1996.*

CLA–2–11:RR:NC:FC:231 817784
Category: Classification
Tariff No. 1104.12.0000,
1702.30.4040, and 2106.90.5830

MR. DAVID MOLL
LIVINGSTON INTERNATIONAL, INC.
*360 Delaware Avenue, Suite 250*
*Buffalo, NY 14202–1610*

Re: The tariff classification of cooked oats, gelatin, and corn syrup from Canada.

DEAR MR. MOLL:

In your letter, dated December 15, 1995, you have requested a tariff classification ruling on behalf of your client, Nealanders International, Inc., Etobicoke, Ontario.

The products are described thus:

1. "Quick Cooked Bagged Oats." The ingredients are 100 percent oats; available in 1.36 kilogram bags.

2. "Supreme Golden Corn Syrup." The ingredients are 90 percent glucose, 5.9 percent water, 3.24 percent sugar, 0.5 percent molasses, 0.2 percent salt, 1 percent potassium sorbate, and 0.06 percent caramel coloring; packed in one liter bottles.

3. "Gelatin—Raspberry." The ingredients are 88.42 percent sugar, 9 percent gelatin, 1.22 percent fumaric acid, 0.5 percent sodium citrate, 0.5 percent salt, 0.32 percent artificial raspberry flavor, and 0.04 percent artificial coloring.

4. "Instant Oatmeal—Maple and Brown Sugar." The ingredients are 77.73 percent instant oats, 17.5 percent sugar, 1.88 percent oat flour, 1.03 percent salt, 1 percent maple flavor, 0.63 percent guar gum, and 0.25 percent vitamin blend. Each box contains ten 40 gram packages.

5. "Hot Chocolate Mix." The ingredients are 51.03 percent sugar, 24.5 percent milk replacer, 10.5 percent cocoa powder, 6.5 percent glucose solids, 5 percent shortening, 1.5 percent lecithin, 0.8 percent salt, and 0.17 percent vanillin; packaged in 500 gram cans.

The applicable subheading for "Quick Cooked Bagged Oats" will be 1104.12.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for cereal grains otherwise worked (for example, hulled, rolled, flaked, pearled, sliced or kibbled), except rice of heading 1006; germ of cereals, whole, rolled, flaked or ground, rolled or flaked grains, of oats. The rate of duty will be 1.6 cents per kilogram.

The applicable subheading for "Supreme Golden Corn Syrup" will be 1702.30.4040, HTS, which provides for other sugars, including chemically pure lactose, maltose, glucose and fructose, in solid form; sugar syrups not containing added flavoring or coloring matter; artificial honey, whether or not mixed with natural honey; caramel, glucose and glucose syrup, not containing fructose or containing in the dry state less than 20 percent by weight of fructose, other, glucose syrup. The rate of duty will be 3.1 percent per kilogram.

The applicable subheading for "Gelatin—Raspberry" will be 2106.90.5830, HTS, which provides for food preparations not elsewhere specified or included, other, other, of gelatin, put up for retail sale, containing sugar derived from sugar cane or sugar beets. The rate of duty will be 5.6 percent *ad valorem*.

In order to issue a ruling on "Instant Oatmeal—Maple and Brown Sugar" and "Hot Chocolate Mix," this office requires the following information:

1. Explain how the oats in "Instant Oatmeal—Maple and Brown Sugar" are processed.
2. Submit a sample of the package in which "Instant Oatmeal—Maple and Brown Sugar" will be imported (a sample as marketed, i.e., filled).
3. Indicate the percentage of ingredients by weight in the LD 14 milk replacer in "Hot Chocolate Mix."

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Ralph Conte at (212) 466–5759.

ROGER J. SILVESTRI.
*Director,*
*National Commodity Specialist Division.*

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[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
*Washington, DC.*

CLA–2 RR:CR:GC 960235K
Category: Classification
Tariff No. 2106.90.9997

MR. DAVID MOLL
LIVINGSTON INTERNATIONAL, INC.
*360 Delaware Avenue, Suite 250*
*Buffalo, NY 14202–1610*

Re: Modification of New York Ruling Letter (NYRL) 817784 Dated January 18, 1996; Supreme Golden Corn Syrup.

DEAR MR. MOLL:

In response to your letter of December 15, 1995, on behalf of Nealanders International, Inc., the Customs Service issued to you NYRL 817784, dated January 18, 1996, concerning

the tariff classification of a variety of products. One of the products, Supreme Golden Corn Syrup, was classified in subheading 1702.30.4040, Harmonized Tariff Schedule of the United States (HTSUS)), which provides for glucose and glucose syrup, not containing fructose or containing in the dry state less than 20 percent by weight of fructose * * * other * * * glucose syrup. This letter is to inform you that Customs is modifying the ruling to reflect the proper classification of the corn syrup.

*Facts:*

The corn syrup contains 90 percent glucose, 5.9 percent water, 3.24 percent sugar, 0.5 percent molasses, 0.2 percent salt, 1 percent potassium sorbate, and 0.06 percent caramel coloring and is packed in one liter bottles.

*Issue:*

Whether the corn syrup as described is excluded from heading 1702, HTSUS, because it contains added coloring matter.

*Law and Analysis:*

Classification of merchandise under HTSUS is in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. The HTSUS provisions under consideration are as follows:

> Heading 1702, HTSUS, provides, in pertinent part, for "Other sugars, including chemically pure lactose, maltose, glucose and fructose, in solid form; sugar syrups not containing added flavoring or coloring matter * * *".
>
> Heading 2106, HTSUS, provides for "food preparations not elsewhere specified of included".

The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and General Rules of Interpretation of the HTSUS. The ENs to chapter 17 on page 138, part (B) Sugar Syrups, state, in pertinent part, that "This part covers syrups of all sugars * * * provided they do not contain added flavouring or coloring matter (see Explanatory Note to heading 21.06)."

The ENs to Chapter 21, on page 171, states that the heading (21.06) includes, *inter alia* (among other things):

> (12) Preparations for the manufacture of lemonades or other beverages, consisting, for example, of$:
>
> —flavoured or coloured syrups, being sugar solutions with natural or artificial substances added to give them the flavour of, for example, certain fruits or plants (raspberry, blackcurrant, lemon, mint, etc.), whether or not containing added citric acid and preservatives;
>
> —syrup flavoured with an added compound preparation of this heading (see paragraph (7) above) containing, in particular, either cola essence and citric acid, coloured with caramelised sugar, or citric acid and essential oils of fruit (e.g., lemon or orange);
>
> —syrup flavoured with fruit juices which have been modified by the addition of constituents (citric acid, essential oil extracted from the fruit, etc.) in such quantities that the balance of the fruit juice constituents as found in the natural juice is clearly upset;
>
> —concentrated fruit juice with the addition of citric acid (in such a proportion that the total acid content is appreciably greater than that of the natural juice), essential oils of fruit, synthetic sweetening agents, etc.
>
> Such preparations are intended to be consumed as beverages after simple dilution with water or after further treatment. Certain preparations of this kind are intended for adding to other food preparations.

According to heading 1702, HTSUS, and the ENs, corn sugar syrup containing caramel coloring is preluded from coverage in heading 1702, HTSUS, and, therefore, is classified in heading 2106, HTSUS.

*Holding:*

Supreme Golden Corn Syrup containing glucose, caramel coloring matter, and other materials, is classified in subheading 2106.90.9997, HTSUS, which provides for food prepara-

tions not elsewhere specified or included * * * other * * * other: containing sugar derived from sugar cane and/or sugar beet.

NYRL 817784 is modified.

JOHN DURANT,
*Director,*
*Commercial Rulings Division,*
*Office of Regulations and Rulings.*

## MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CONFECTIONERS COATINGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (hereinafter referred to as 19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify New York Ruling letter (NYRL) A80434, dated March 6, 1996, concerning the classification of certain confectioners coatings.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 12, 1998.

FOR FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch, Office of Regulations and Rulings (202) 927–1109.

SUPPLEMENTARY INFORMATION:

### BACKGROUND

On June 17, 1998, Customs published in the CUSTOMS BULLETIN, Volume 32, No 24, a notice of a proposal to modify NYRL A80434, dated March 6, 1996, which held that a certain confectioners coating was classified in subheading 2106.90.8200, HTSUS. No comments were received in response to the notice.

Pursuant to 19 U.S.C. 1625, this notice advises interested parties that Customs is modifying NYRL A80434 to reflect the proper classification of the confectioners coating in subheadings 2106.90.64 and 2106.90.66, HTSUS. Headquarters Ruling Letter 960017, modifying NYRL A80434, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 23, 1998

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division,
Office of Regulations and Rulings.)

[Attachment]

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[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
*Washington, DC, July 23, 1998.*

CLA–2 RR:CR:GC 960017K
Category: Classification
Tariff No. 2106.90.64 and 2106.90.66

MR. BEAT HERRMAN
MAX FELCHLIN INC., SCHWYZ
*Banhofstrasse 63*
*6430 Schwyz, Switzerland*

Re: Tariff Classification of Confectioners Coating; FE51E Ultra White; Modification of New York Ruling Letter (NYRL) A80434.

DEAR SIR:

In response to your letter dated February 13, 1996, the Customs Service issued NYRL A80434, dated March 6, 1996, which held that one of the articles, a certain confectioners coating from Switzerland known as FE51E Ultra White, was classified in subheading 2106.90.8200, Harmonized Tariff Schedule of the United States (HTSUS) (1996), as food preparations not elsewhere specified or included * * * other * * * containing over 10 percent by weight of other milk solids * * * other * * * other, with duty at the general rate of 8.8 percent *ad valorem*.

This letter is to inform you that NYRL A80434 no longer reflects the views of the Customs Service and is modified in accordance with section 177.9(d) of the Customs Regulations (19 CFR 177.9(d)). Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NYRL A80434 was published on June 17, 1998, in the CUSTOMS BULLETIN, in Volume 32, No. 24. No comments were received in response to the notice.

*Facts:*

FE51E Ultra White is described as a pale white solid material, composed of 40 percent sugar, 37 percent vegetable fat, 12 percent skimmed milk powder, 6 percent dextrose, 5 percent whole milk powder, and trace amounts of lecithin and vanillin. The product was put up in 2-kilogram bars, and sold to pastry chefs and confectioners, to be used as a coating for their wares.

*Issue:*

Whether a confectioners coating, FE5IE Ultra White, is more specifically provided for in subheadings 2106.90.64 and 2106.90.66, HTSUS, rather than in subheading 2106.90.8200, HTSUS.

*Law and Analysis:*

Additional U.S. Note 1 of Chapter 4, HTSUS, states that:

> For the purposes of this schedule, the term "dairy products described in additional U.S. note 1 to chapter 4" means any of the following goods: malted milk, and articles of milk or cream (except (a) white chocolate and (b) inedible dried milk powders certified to be used for calibrating infrared milk analyzers); articles containing over 5.5 percent by weight of butterfat which are suitable for use as ingredients in the commercial production of edible articles (except articles within the scope of other import quotas provided for in additional U.S. notes 2 and 3 to chapter 18); or, dried milk, whey or buttermilk (of the type provided for in subheadings 0402.10, 0402.21, 0403.90 or 0404.10) which contains not over 5.5 percent by weight of butterfat and which is mixed with other ingredients, including but not limited to sugar, if such mixtures contain over 16 percent milk solids by weight, are capable of being further processed or mixed with similar or other ingredients and are not prepared for marketing to the ultimate consumer in the identical form and package in which imported.

Subheadings 2106.90.64 and 2106.90.66, HTSUS, provide for food preparations not elsewhere specified or provided for, other dairy products described in Additional U.S. Note 1 to Chapter 4. A "dairy product described in Additional U.S. Note 1 to Chapter 4" may be an article falling into any of three classes of merchandise described therein: malted milk and articles of milk or cream, certain articles containing over 5.5 percent butterfat, and, what is relevant here, "dried milk, whey or buttermilk (of the type provided for in subheadings 0402.10, 0402.21, 0403.90, or 0404.10) which contains not over 5.5 percent by weight of butterfat and which is mixed with other ingredients, including but not limited to sugar, if such mixtures contain over 16 percent milk solids by weight, are capable of being further processed or mixed with similar or other ingredients and are not prepared for marketing to the ultimate consumer in the identical form and package in which imported." FE51E Ultra White falls into this third category of articles.

FE51E Ultra White is composed of dried skimmed milk powder, a product of subheading 0402.10, that is mixed with other ingredients. It contains over 16 percent milk solids by weight (12 percent skimmed milk powder and 5 percent whole milk powder), is capable of being further processed or mixed with similar or other ingredients, and is not prepared for marketing to the ultimate consumer in the identical form and package in which imported. The terms "capable of being further processed * * *", "prepared for marketing to the ultimate consumer * * *", and "ultimate consumer", are defined in Section IV, Additional U.S. Notes 2(b), (c), and (d), HTSUS. Those definitions are applicable for FE51E Ultra White. The product is "capable of being further processed * * *" because it is a solid material, and must be heated to change it to a fluid consistency before it be used. It is, therefore, "in such condition * * * as to be subject to any additional preparation, treatment or manufacture * * *". It is not prepared for marketing to the ultimate consumer because it will be sold to pastry chefs and confectioners, neither of which are considered an "ultimate consumer" by Section IV, Additional U.S. Note 2(d), HTSUS.

Subheadings 2106.90.64 and 2106.90.66 fall under the superior heading for "other, dairy products described in Additional U.S. Note 1 to Chapter 4." In contrast, 2106.90.82, is the residual subheading under an "other * * * other" subheading. Clearly, 2106.90.64 and 2106.90.66 are the more demanding, and therefore more specific tariff provisions. If the product meets the requirements for classification in either of these two subheadings, it must be classified there and we believe that it does.

*Holding:*

FE51E Ultra White, as described, is classified as other food preparations not elsewhere specified or included, other dairy products containing over 10 percent by weight of milk solids, in subheading 2106.90.64, HTSUS, if within the quantitative limitations of Additional U.S. Note 10 to Chapter 4, with a 1998 general rate of duty of 10 percent *ad valorem*. If the quantitative limitations of the Note have been reached, the product is classified in subheading 2106.90.66, HTSUS, with duty at the general rate of 78.7 cents per kg, plus 9.5 percent *ad valorem*.

NYRL A80434 is modified.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK
(for John Durant, Director,
Commercial Rulings Division,
Office of Regulations and Rulings.

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